STATE OF MICHIGAN

COURT OF APPEALS

LAURA WOODS,

Plaintiff-Appellant,

v

CITY OF SAGINAW and MARGARET NAYLOR,

Defendants-Appellees.

UNPUBLISHED
June 30, 2009

No. 283781
Saginaw Circuit Court
LC No. 06-060665-NI

Before: Sawyer, P.J., and Murray and Stephens, JJ.

PER CURIAM.

Plaintiff, Laura Woods, appeals as of right the judgment reflecting the jury verdict entered by the trial court of no cause of action in favor of defendant, Margaret Naylor. Plaintiff also appeals the trial court's denial of plaintiff's motions for judgment notwithstanding the verdict (JNOV) and a new trial. Finally, plaintiff appeals the trial court's granting defendant, City of Saginaw's, motion for summary disposition. We affirm the decisions of the trial court.

I

On September 21, 2005, plaintiff was a passenger in a van driven by defendant. The two were driving in the City of Saginaw, when defendant drove her van into a hole in the road filled with wet cement. There were two workers at the accident scene who were employed by the City of Saginaw. Plaintiff testified that she screamed when she saw the hole and before defendant drove into it. Defendant testified that she did not see the hole until it was approximately one foot in front of the van. The city did not display any signs or warnings that would indicate that the road was under construction at the time of the accident. Plaintiff hit her head on the top of the van as it went through the hole in the road. A police officer arrived at the scene and created an accident report, but did not issue a traffic ticket to defendant. Finally, plaintiff underwent surgery on her neck and her shoulder as a result of the accident.

In June of 2006, plaintiff filed suit against defendant and the City of Saginaw. The trial court dismissed the City of Saginaw because it found that plaintiff failed to serve notice on the city under MCL 691.1404. Defendant Naylor filed a notice of nonparty fault alleging that the City of Saginaw was solely at fault for the accident. Plaintiff filed a motion to strike defendant's notice of nonparty fault, which the trial court denied. On December 13, 2007, the trial court

entered the judgment reflecting the jury's verdict in favor of defendant. On December 27, 2007, plaintiff filed a motion for judgment notwithstanding the verdict (JNOV) and for a new trial, which the trial court subsequently denied. Plaintiff appeals by right the judgment entered on December 13, 2007.

II

Plaintiff first argues that defense counsel's references to the non-issuance of a traffic ticket to defendant denied plaintiff substantial justice; thus, the trial court erred when it denied plaintiff's motion for a new trial. We disagree. This Court reviews a trial court's decision on a motion for new trial for an abuse of discretion. *Coble v Green*, 271 Mich App 382, 389; 722 NW2d 898 (2006). In addition, a trial court's ruling regarding the admission of evidence is reviewed for an abuse of discretion. *Barrett v Kirtland Community College*, 245 Mich App 306, 325; 628 NW2d 63 (2001). Generally, an appellate court should defer to the trial court's judgment, and if the trial court's decision results in an outcome within the range of principled outcomes, it has not abused its discretion. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006), cert den 549 US 1206; 127 S Ct 1261; 167 L Ed 2d 76 (2007).

In a civil trial, evidence of the issuance or non-issuance of a traffic citation is irrelevant, and it is erroneous for a trial court to admit such evidence. *Brownell v Brown*, 114 Mich App 760, 767; 319 NW2d 664 (1982). In *Brownell*, the plaintiffs moved the court to rule on their motion in limine, before opening arguments, to preclude the defendant from introducing evidence that no traffic ticket had been issued to the defendant following the accident. *Id.* The trial court denied the plaintiffs' motion, and allowed defendant to offer such evidence. *Id.* This Court held that the trial court erred in doing so, but that the error was harmless beyond a reasonable doubt. *Id.* For cumulative evidentiary error to mandate reversal, actual errors must combine to cause substantial prejudice to the aggrieved party so that failing to reverse would deny the party substantial justice. MCR 2.613(A); *Miller v Hensley*, 244 Mich App 528, 531; 624 NW2d 582 (2001). Finally, the Supreme Court has held that they will uphold the trial judge's determination that inadvertent testimony, even though prejudicial, was harmless, if the jury is given proper instructions, and there are no repeated efforts to introduce the prejudicial testimony. *Ilins v Burns*, 388 Mich 504, 511; 201 NW2d 624 (1972).

Similar to *Brownell*, defense counsel here was originally able to discuss the non-issuance of the traffic ticket in his opening argument and direct examination of plaintiff, which could constitute errors. However, the cumulative effect of the actual errors does not combine to cause substantial prejudice to plaintiff so that failing to reverse would deny her substantial justice. MCR 2.613(A); *Miller, supra*. First, defense counsel's closing statements, when read in totality, discuss other witnesses' complaints about plaintiff's driving, not specifically whether a ticket was issued to defendant. So, once defendant was precluded from introducing evidence of the non-issuance of the ticket, defense counsel made no other statements or remarks referencing the non-issuance of the ticket. Second, the jury instructions clearly state that jurors were not to regard any statements or remarks made by the attorneys as evidence in this case. Further, jurors are and must be presumed to understand and follow the court's instructions. *Bordeaux v Celotex Corp*, 203 Mich App 158, 164; 511 NW2d 899 (1993). Finally, defense counsel did not further explore the non-issuance of the ticket and the trial court kept out the police officer's testimony on the issue, which precluded any repetition of the issue in front of the jury. See *Ilins, supra*.

Thus, if any actual errors were made, they were harmless and did not combine to cause substantial prejudice to plaintiff so that failing to reverse would deny her substantial justice.

III

Plaintiff next argues that the trial court improperly precluded plaintiff's expert witness, Mr. Bereza, from testifying at trial. We disagree. This Court reviews the trial court's determination as to whether the proposed expert witness was qualified to serve as an expert witness for an abuse of discretion. *Tate v Detroit Receiving Hosp*, 249 Mich App 212, 215; 642 NW2d 346 (2002). Generally, an appellate court should defer to the trial court's judgment, and if the trial court's decision results in an outcome within the range of principled outcomes, it has not abused its discretion. *Maldonado v Ford Motor Co*, *supra*.

MRE 702, governing the admission of testimony by experts, provides:

> If the court determines that scientific, technical, or other specialized knowledge *will assist the trier of fact* to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case. [Emphasis added.]

Under this rule, a trial court may admit evidence if it meets a three-part test: "[f]irst, the expert must be qualified. Second, the evidence must provide the trier of fact a better understanding of the evidence or assist in determining a fact in issue. Finally, the evidence must be from a recognized discipline." *In re Wentworth*, 251 Mich App 560, 563; 651 NW2d 773 (2002). Also, expert testimony may be admitted not only if "necessary," but also when it will assist the trier of fact. *Slocum, supra.*

Plaintiff moved to have Mr. Bereza admitted as an expert in accident reconstruction to testify that defendant should have seen the hole and swerved to avoid it. However, Mr. Bereza based his opinion on a review of depositions and documents, not on any tests or calculations. Mr. Bereza did not visit the accident scene soon after the accident happened, but a long time after. He further testified that he was not an expert in the human factors field, but that it was an essential part of accident reconstruction. So, the trial court was correct when deciding that Mr. Bereza would not assist the jury in understanding the evidence because they could make the determinations themselves.

Thus, because Mr. Bereza could not assist the trier of fact to understand the evidence or to determine a fact in issue, the trial court did not abuse its discretion in precluding him from testifying as an expert.

IV

Plaintiff also argues she presented evidence that defendant violated MCL 257.627, so model civil jury instruction 12.01 was applicable, and the trial court erred in denying plaintiff's request that the jury be given M Civ JI 12.01. We disagree. This Court reviews claims of

instructional error de novo. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). The trial court must give a jury instruction if a party requests such instruction, and it is applicable to the case. MCR 2.516(D)(2). Moreover, this Court reviews for abuse of discretion the trial court's determination whether a standard jury instruction is applicable and accurate. *Stevens v Veenstra*, 226 Mich App 441, 443; 573 NW2d 341 (1997).

The trial court's jury instructions must include all the elements of the plaintiff's claims and should not omit any material issues, defenses, or theories of the parties that the evidence supports. *Case, supra* at 6. Instructions not supported by the evidence should not be given. *Id.* If the theories of the parties and the applicable law are adequately and fairly presented to the jury, no error requiring reversal occurs. *Id.* Reversal based on instructional error is only required where the failure to reverse would be inconsistent with substantial justice. MCR 2.613(A); *Case, supra*.

In this case, the trial court found that plaintiff did not present any evidence that defendant violated MCL 257.627. On plaintiff's motion, testimony regarding the non-issuance of the traffic ticket was kept out of the trial. There was also no testimony that defendant was driving too fast for road conditions, and plaintiff testified that she did not have any complaints about defendant's driving on the day of the accident.

Thus, the trial court did not abuse its discretion in ruling that M Civ JI 12.02 was inapplicable because plaintiff presented no evidence supporting the contention that defendant violated MCL 257.627. *Case, supra.*

V

Plaintiff argues that the trial court impermissibly commented on evidence presented at trial, and the comment that holes in the roadway are common in Michigan was prejudicial to plaintiff's negligence theory before the jury. However, plaintiff did not object to the trial court's allegedly impartial comments during trial, therefore the issue is not preserved absent manifest injustice. *People v Sharbnow*, 174 Mich App 94, 99-100; 435 NW2d 772 (1989). The trial court's comment regarded the clarity of defense counsel's question, not a matter of substance. Therefore, no injustice would occur from our failure to review this issue, and we decline to do so.

VI

Plaintiff next argues that the trial court improperly allowed defense counsel to use demonstrative evidence during his closing argument. We disagree. Specifically, plaintiff complains of defendant's use of a barricade, which had not been introduced into evidence or admitted as an exhibit.

This Court reviews the trial court's ruling with regard to closing argument for an abuse of discretion. *Wilson v General Motors Corp*, 183 Mich App 21, 27-28; 454 NW2d 405 (1990). When determining the admissibility of demonstrative evidence, "[u]nless the demonstrative evidence bears *enough* similarity to some factual circumstance at issue in the trial, that evidence is not relevant because it advances no germane factual proposition that can meaningfully assist the trier of fact." *Lopez v General Motors Corp*, 224 Mich App 618, 629; 569 NW2d 861 (1997)

(emphasis in original). Further, when a trial court admonishes the jury through its jury instructions that an attorney's statements during closing argument are not evidence, generally no prejudice arises. *Tobin v Providence Hosp,* 244 Mich App 626, 641; 624 NW2d 548 (2001).

In this case, the barricade was not admitted as evidence during trial, and defense counsel used it to support the position that the City of Saginaw was solely at fault in this case because it failed to place a barricade in front of the hole. Evidence, such as photographs and testimony, was admitted bearing enough similarity to the factual circumstances in this trial for the barricade to be allowed. Specifically, defense counsel's use of the barricade was relevant and germane to the issue of fault because he argued that the city was at fault, not defendant. The trial court also instructed the jury that any attorney's statements during closing argument were not evidence, which cured any prejudice that could have occurred by the use of the barricade during defense counsel's closing statement. Thus, the trial court did not abuse its discretion by allowing defense counsel to use the barricade as demonstrative evidence in his closing argument.

VII

Plaintiff argues that the trial court improperly denied plaintiff's motion for JNOV because no reasonable juror could find that defendant was not negligent in driving her van. We disagree. A trial court's decision on a motion for JNOV is reviewed de novo. *Sniecinski v BCBSM,* 469 Mich 124, 131; 666 NW2d 186 (2003). Judgment notwithstanding the verdict should be granted only when there was insufficient evidence presented to create an issue for the jury. *Merkur Steel Supply, Inc v Detroit,* 261 Mich App 116, 123; 680 NW2d 485 (2004). Additionally, the Court must view the evidence in the light most favorable to the nonmoving party to determine whether a question of fact existed. *Sniecinski, supra*. Finally, if reasonable jurors could differ over the evidence presented, then a question of fact exists for the jury and JNOV is improper. *Foreman v Foreman,* 266 Mich App 132, 136; 701 NW2d 167 (2005).

Viewing the evidence in favor of defendant, the evidence presented created factual issues regarding whether defendant could see the hole and whether she could have avoided driving through it. Even though plaintiff's testimony gave the impression defendant was distracted, neither plaintiff nor defendant saw the hole until it was approximately one foot away. A city worker who witnessed the accident did testify that a reasonably prudent driver could have avoided driving through the hole; however, there were no signs or barricades that would indicate any form of construction on the day of the incident. Further, plaintiff stated that at the same time she screamed, defendant tried to swerve and depressed the brakes. Finally, defendant testified that the area where the hole was located looked exactly like the rest of the road until she was immediately in front of it. Thus, the differing factual issues were properly submitted to the jury and the trial court's denial of plaintiff's motion for JNOV was proper.

VIII

Plaintiff next argues that the trial court erred in granting summary disposition in favor of defendant city based upon a violation of the notice requirement of MCL 691.1404 because the city had actual notice of plaintiff's injury. Plaintiff bases the actual notice on her having talked with the investigating officer and other city employees who created accident reports for the city. Plaintiff distinguishes this case from *Rowland v Washtenaw Co Rd Comm,* 477 Mich 197; 731

NW2d 41 (2007), because, unlike *Rowland*, defendant city had actual knowledge of plaintiff's injuries and *Rowland* did not address the form of notice required under MCL 691.1404. Accordingly, plaintiff argues that she complied with the notice requirement under MCL 691.1404 because defendant city had actual notice of plaintiff's injuries. Therefore, defendant city was properly served, and the trial court improperly granted defendant city's motion for summary disposition. We disagree.

This Court reviews the grant of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Further, the construction, interpretation, and application of court rules is a question of law that is also reviewed de novo. *ISB Sales Co v Dave's Cakes*, 258 Mich App 520, 526; 672 NW2d 181 (2003). Finally, this Court reviews de novo questions of statutory interpretation. *Rowland, supra* at 202. The primary goal of construing a statute is to give effect to the intent of the Legislature. *Id*. When the language of the statute is unambiguous, the Court gives the words their plain meaning and applies the statute as written. *In re MCI Telecom Complaint*, 460 Mich 396, 411; 596 NW2d 164 (1999).

This suit falls under the "highway exception" under the Governmental Tort Liability Act (GTLA), MCL 691.1402; however, under the GTLA, notice must be provided to the city within 120 days from the time the injury occurred. MCL 691.1404.

MCL 691.1404 provides, in pertinent part:

> (1) As a condition to any recovery for injuries sustained by reason of any defective highway, the injured person, within 120 days from the time the injury occurred, except as otherwise provided in subsection (3) shall serve a notice on the governmental agency of the occurrence of the injury and the defect. The notice shall specify the exact location and nature of the defect, the injury sustained and the names of the witnesses known at the time by the claimant.
>
> (2) The notice may be served upon any individual, either personally, or by certified mail, return receipt requested, who may lawfully be served with civil process directed against the governmental agency, anything to the contrary in the charter of any municipal corporation notwithstanding . . . .

The Michigan Supreme Court held that MCL 691.1404 "is straightforward, clear, unambiguous, and not constitutionally suspect. Accordingly, we conclude that it must be enforced as written." *Rowland, supra* at 219. Further, MCR 2.105(G)(2) provides the proper way to serve process on a municipality.

MCR 2.105(G) provides, in pertinent part:

> Service of process on a public, municipal, quasi-municipal, or governmental corporation, unincorporated board, or public body may be made by serving a summons and a copy of the complaint on:
>
> * * *

(2) the mayor, the city clerk, or the city attorney of a city.

Therefore, under MCL 691.1404(2), notice may be served to any person "who may lawfully be served." When read in conjunction with MCR 2.105(G)(2), if a plaintiff sues a municipality, the persons who can be lawfully served with process are "the mayor, the city clerk, or the city attorney of a city." In this case, plaintiff does not allege that she gave notice to defendant city's mayor, clerk, or attorney. On the contrary, plaintiff argues that defendant city had actual knowledge of the accident and plaintiff's injuries because its workers were present on the date of the accident. Because plaintiff did not give notice to defendant city's mayor, clerk, or attorney as required by the statute, she did not provide proper notice within the required 120 days. Thus, the trial court properly dismissed plaintiff's claim against the city. MCR 2.116(C)(3); see *Holliday v Townley*, 189 Mich App 424, 425-426; 473 NW2d 733 (1991).

IX

Finally, plaintiff argues that because the trial court granted defendant city's motion for summary disposition based on the required period of limitations, pursuant to MCL 600.2957(2) defendant Naylor could not file notice of nonparty fault against defendant city. Thus, the trial court improperly denied plaintiff's motion to strike notice of nonparty fault. We disagree.

The trier of fact must determine the fault of each person or persons who contributed to the injury, regardless of whether such persons were or could have been named as parties in a tort action involving personal injury. MCL 600.2957(1); MCL 600.6304(1)(b); *Snyder v Advantage Health Physicians*, 281 Mich App 493, 500; 760 NW2d 834 (2008). Therefore, "[b]ecause under these provisions [MCL 600.2957 and MCL 600.6304] the jury is required to allocate fault of all persons, parties as well as nonparties, we believe that a jury may hear evidence regarding every alleged tortfeasor who has been involved, even parties who have been dismissed, and by the same token, that a party must be permitted to refer to the involvement of nonparties." *Barnett v Hidalgo*, 478 Mich 151, 170; 732 NW2d 472 (2007). Finally, the trier of fact must not assess the fault of a nonparty unless proper notice has been given 91 days after the party files its first responsive pleading. MCR 2.112(K); *Rinke v Potrzebowski*, 254 Mich App 411, 415; 657 NW2d 169 (2002).

In this case, plaintiff contends that, pursuant to MCL 600.2957(2), because she was time-barred from adding defendant city as a party to this original action, defendant Naylor is also barred from adding it as a nonparty. However, the statute bars adding a cause of action against a nonparty if the statute of limitation would have barred such cause of action in the original action. Here, defendant city was not dismissed as a party because a statute of limitation had expired; rather, plaintiff failed to provide proper notice to defendant city. Notice provisions are different than statutes of limitation: "[n]otice provisions are designed, [i]nter alia, to provide time to investigate and to appropriate funds for settlement purposes. Statutes of limitation are intended to prevent stale claims and to put an end to fear of litigation." *Davis v Farmers Ins Group of Cos*, 86 Mich App 45, 47; 272 NW2d 334 (1978). Thus, the time-bar provision under MCL 600.2957(2) is inapplicable to this case. So, even though defendant city was dismissed as a party, it was still proper for the jury to consider the city when allocating fault pursuant to MCL 600.2957 and MCL 600.6304. *Barnett, supra.* Because MCL 600.2957 and MCR 2.112(K)

allow for the trier of fact to consider allocating fault to defendant city as a nonparty, the trial court properly denied plaintiff's motion to strike defendant Naylor's notice of nonparty fault.

Affirmed.

/s/ David H. Sawyer
/s/ Christopher M. Murray
/s/ Cynthia Diane Stephens